IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 20 OF 2006

Smt. Chanda Mhawalankar
H.No. 39,
Headland Sada,
Mormugao, Goa. .... Appellant

V/s

1. Shri Mahesh Sawant
Fair Price Shop No. 40,
Municipal Market,
Near Mahalaxmi Statue,
Vasco-da-Gama, Goa.

2. STATE. .... Respondents

Mr. S.V. Talaulikar, Advocate for the Appellant.
Mr. G. Vijaychandran, Advocate for Respondent No.1.

CORAM : N.A. BRITTO, J.

DATE : 27th SEPTEMBER, 2007

ORAL JUDGMENT :

This is complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instrument Act, 1881, by judgment dated 31/08/2005 of the learned JMFC, Vasco-da-Gama.

2. The complainant and the accused were known to one another and on earlier occasions, the complainant had lent on two or three occasions friendly loans to the accused which were repaid.

3. This case pertains to a cheque dated 9/11/2001 admittedly issued by the accused to the complainant. There is no dispute that the said cheque was signed and written by the accused and according to the accused he had not written the amount both in words and figures on the said cheque but according to the complainant even that was written by the accused. There is also no dispute that the loan was disbursed by the complainant to the accused on 8/10/2001 and the said cheque was given by the accused to the complainant on 9/11/2001. As per the complainant, the complainant had advanced to the accused a loan of Rs. 30,000/- but according to the accused the loan advanced was only Rs. 5,000/-.

4. As per the complainant, she had advanced the said loan of Rs. 30,000/- upon the accused agreeing to repay the same within one month and towards the repayment the accused had issued to the complainant a post dated cheque dated 9/11/2001 for a sum of Rs. 30,000/- drawn on Punjab National Bank, Vasco-da-Gama Branch with instructions to deposit the same and realise the amount on the date of its maturity. The complainant deposited the said cheque in her Bank namely Mapusa Urban Co-operative Bank Ltd., Vasco-da-Gama but the said cheque came to be returned unpaid on 23/11/2001 with the endorsement that the funds were insufficient. There is also no dispute that the complainant sent the statutory notice through her Advocate dated 28/11/2001 informing about the dishonour of the cheque and demanding from

the accused the value of the said cheque either by cash or by demand draft within fifteen days. There is again no dispute that the accused replied the said notice by his reply dated 18/12/2001 stating that the accused would be expecting some funds in March, 2002 and as soon as the same were received by him, the accused would clear the account of the complainant. It is interesting to note that the complainant did not mention in the statutory notice sent on her behalf the amount the complainant was claiming from the accused and likewise the accused also did not mention the amount which he would pay to the complainant after he received the funds. In other words the statutory notice sent on behalf of the complainant was silent that the loan payable by the accused was Rs. 30,000/- and likewise the reply sent by the accused was also silent that the accused was liable to pay only Rs. 5,000/-

5. The complainant examined herself in support of her case and also the Bank Manager of the bank of the accused namely Punjab National Bank and according to him the cheque return memo was issued by his said bank on 15/11/2001. When the said cheque was shown to him he stated that the rubber stamp put by the presenting bank indicated the date as 6/11/2001. The accused also examined himself in support of his defence and also examined the complainant's Bank Manager who did not support the case of the defence that the said cheque was presented on 6/11/2001. Although he was not cross-examined, on behalf of the accused, even when leading questions were asked

to him, he answered the same in favour of the complainant. According to him the complainant had presented the cheque for payment on 16/11/2001 and it was presented for clearing on 16/11/2001 and not 6/11/2001. He stated that the said cheque was presented to the complainant's bank on 16/11/2001 and was returned to the complainant only after 22/11/2001. He denied the suggestion that the cheque was presented on 15/11/2001. He also produced local collection and cheque returning registers to support his statements.

6. The learned Magistrate observed that the complainant had clearly stated in her cross-examination that she did not remember the date on which the complainant had deposited the cheque for encashment in her account and therefore there is nothing on record to show as to on which date the complainant deposited the cheque for repayment as the cheque was post dated, having the date 9/11/2001. The learned Magistrate also observed, that in her further cross-examination, the complainant had stated that she did not remember whether the cheque was presented by her on 6/11/2001 but she had deposited the same prior to 15/11/2001 and she had not stated the exact date and this reflected the inconsistent stand taken by the complainant. The learned Magistrate ultimately came to the conclusion that the cheque was presented by the complainant before its due date and on that count the complaint had to be dismissed as being not maintainable. However, the learned Magistrate did not at all consider the effect of the evidence of the

complainant's Bank's Branch Manager namely DW2/Premanand Amonkar when he categorically stated that the complainant had presented the said cheque on 16/11/2001 and if that was so the cheque could not have been returned on 15/11/2001 as stated by the Branch Manager of the bank of the accused namely PW2/Audhoot Kamat.

7. Shri Vijaychandran, the learned Counsel on behalf of the Respondent No.1/Accused contends that the learned Magistrate after considering the evidence led on behalf of the parties have come to the conclusion that the said cheque was deposited by the complainant on 6/11/2001 before its due date and that being a plausible view, this Court may not interfere with the said findings. On the other hand Shri Talaulikar, the learned Counsel on behalf of the complainant submits that whether the cheque was presented on 15th or 16th November, 2001 would be immaterial as the cause of action in favour of the complainant would start after 15 days of the service of statutory notice upon the complainant.

8. Admittedly, the said cheque was presented within 6 months of its validity. It is also not the case of the accused that the complaint was not filed within 1 month from the date of cause of action. It was also not the case of the accused that the cheque was presented prematurely i.e. prior to 9/11/2001. If that was the case the accused would have clearly stated to be so in his reply

dated 18/12/2001 and the bank also would have returned the same for presenting it prematurely. The accused has been trying to take advantage of a mistake made by PW2/Kamat by issuing a cheque return memo dated 15/11/2001 and identifying the date on the said cheque as 6/11/2001 instead of 16/11/2001 which has been identified as such by the very witness examined on behalf of the accused namely DW2/Premanand Amonkar. The complainant had consistently stated that she did not remember the date when the cheque was presented and possibly after realizing that the cheque return memo issued by the bank of the accused was dated 15/11/2001, the complainant stated that she had presented the cheque prior to 15/11/2001. The best evidence on the controversy would be that of the Manager of the Bank of the complainant (DW2) who was examined by the accused himself and who categorically maintained that the complainant had presented the said cheque on 16/11/2001. He also categorically denied the suggestion, that too in his examination-in-chief itself, that the said cheque was presented on 6/11/2001 before it is due date. He also identified the date of clearing as 16/11/2001 and not 6/11/2001 as otherwise stated by PW2/Audhoot Kamat. Counsel on behalf of the complainant refers to Section 138 of the Act and submits that what should carry weight is the memorandum of dishonour issued by the bank of the accused on which the cheque is drawn. Even if the said memorandum is considered, it does not show that the cheque was presented prior to its due date though it might show that it was presented on

15/11/2001. However, the evidence of the very witness of the accused namely DW2 clearly shows that the cheque was presented by the complainant on 16/11/2001 and therefore the return memo with date 15/11/2001 issued by PW2 is a clear mistake. In any event it must also be stated that the said memorandum dated 15/11/2001 does not state that the cheque was presented prematurely and in any event this controversy was irrelevant either for the purpose of conviction or acquittal of the accused. At the cost of repetition, it must be reiterated that in case the complainant had presented the said cheque prematurely the accused would have stated this fact in his reply and the bank of the accused would have returned the same as unpaid having been presented prematurely. There is no doubt that if on the same evidence two views are reasonably possible and the Court below takes a view in favour of the accused, the appellate Court is not entitled to set their acquittal aside unless it finds the finding to be perverse or unreasonable or based on no evidence or has given ignorance of relevant evidence on record or for such other reasons. The view of the learned Magistrate that the cheque was presented for payment prematurely cannot be upheld in the light of the reply filed by the accused, the memorandum issued by PW2 as well as the evidence of DW2. It is also to be noted that the appellate powers of this Court against an order of acquittal are no different from the powers against an order of conviction. This Court is entitled to review at large the evidence upon which the order of acquittal is found and to reach the conclusion that upon that evidence, the order of

acquittal should be reversed. It is the bounden duty of this Court to ensure that justice is done and miscarriage to justice is prevented. Acquittal of the guilty and the conviction of the innocent are both to be avoided. As observed by the Apex Court in the case of ***Himachal Pradesh V/s. Lekh Raj & Sons (AIR 1999 SC 3916)*** the traditional dogmatic hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial.

9. In the circumstance, the conclusion arrived at by the learned Magistrate that the cheque was presented prematurely has got to be rejected.

10. Returning to the merits of the case, the execution and giving of the cheque by the accused to the complainant is admitted except for the amount due both in words and in figures which according to the accused was not written by him but according to the complainant even the same was written by the accused. The Apex Court in ***K. Bhaskaran V/s. Sankaran Vaidhyan Balan (AIR 1999 SC 3762)*** has stated that as the signature in the cheque is admitted to be that of the accused, the presumption envisaged under Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of a debt or liability. The burden was on the accused to rebut

the aforesaid presumption. The Apex Court again in ***Hiten P. Dalal V/s. Bratindranath Banerjee (AIR 2001 SC 3897)*** has stated that the presumption under Sections 138 and 139 of the Act that the cheque was drawn for discharge of liability of a trial is a presumption of law which ought to be raised by the Court in every case and that mere plausible explanation is not sufficient and proof of explanation is necessary. In other words it is for the accused to prove that there was no debt or liability and this burden can be discharged by the accused by a lower standard that is to say by balance of probabilities. However, I must hasten to add that in this case only part of the liability is admitted. It is difficult to accept that the accused would write the entire cheque except for the amount in words and figures and give the same to the complainant in case the accused owed to the complainant only a sum of Rs. 5,000/-. As a prudent person the accused would have written the sum of Rs. 5,000/- in case he had borrowed that much amount from the complainant on the said cheque. The cheque mentions the amount of Rs. 30,000/- in words and in figures and according to the complainant even this part of the cheque was written by the accused himself and in my view this is the statement which ought to have been accepted by the learned trial Court when made in the light of the other statements made by the accused. The accused in his reply dated 18/12/2001 admitted his liability and though he did not specify the quantum of it, promised to pay the complainant the sum borrowed by him. Inspite of the said reply promising to pay the amount due to the complainant,

the accused has stated in his affidavit in evidence that he had made part payment to the complainant prior to 18/12/2001 and the balance was paid subsequently for which no receipt was issued by the complainant. This story of the accused in his affidavit in evidence cannot at all be accepted in the light of the admission of the accused to clear the debt in the reply dated 18/12/2001. The accused also stated in his affidavit in evidence that only interest payment was left to be cleared on the sum of Rs. 5,000/- which he had borrowed from the complainant. It is not the case of the complainant that she had advanced the loan to the accused on payment of interest and not even a suggestion to that effect was not put to the complainant during her cross-examination. Presumably, the complainant did not mention the amount of Rs. 30,000/- in her statutory notice because the accused had given to the complainant the said cheque of Rs. 30,000/- and for that reason demanded the payment due on the said cheque and the fact that the complainant had not mentioned the amount of the cheque on the statutory notice cannot be as a indication that the accused had borrowed only a sum of Rs. 5,000/- from the complainant. The cheque given by the accused to the complainant on the very face of it supports the evidence of the complainant. It does not support the case of the accused at all that he had kept a blank as to the amount to be paid to the complainant on the said cheque and that he owed only a sum of Rs. 5,000/- to the complainant. The accused had failed to prove that the debt he was liable to pay was only of Rs. 5,000/- which on the face of the said cheque

and the evidence of the complainant showed that it was of Rs. 30,000/- It also may be stated that at one stage the accused was asked to produce the counter foil of the cheque but the accused did not produce the same. Adverse inference had to be drawn against the accused for non production of the said counter foil of the cheque.

11. Consequently the learned Magistrate was not at all justified in acquitting the accused.

12. Hence, the appeal is allowed. The judgment of the learned Magistrate dated 31/08/2001 is hereby set aside and the accused convicted under Section 138 of the Negotiable Instrument Act, 1881.

13. Counsel on behalf of both parties are heard on the quantum of sentence. Counsel on behalf of the complainant submits that the complainant would be satisfied in case the accused is ordered to pay the compensation of Rs. 30,000/- only. In the light of the said concession, the accused is sentenced under Section 138 of the Act to undergo SI for a period of 15 days and to pay compensation to the complainant in the sum of Rs. 30,000/-, in default to undergo 6 months' SI. The accused to surrender within a period of 2 weeks before the learned Magistrate to undergo the sentence.

N.A. BRITTO, J.

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